



Cleveland State University
EngagedScholarship@CSU

Law Faculty Articles and Essays

Faculty Scholarship

2019

The Faith and Morals of Justice Antonin Scalia

David Forte

Cleveland-Marshall College of Law, Cleveland State University, d.forte@csuohio.edu

Follow this and additional works at: https://engagedscholarship.csuohio.edu/fac_articles



Part of the [Constitutional Law Commons](#), [Courts Commons](#), [Judges Commons](#), and the [Supreme Court of the United States Commons](#)

How does access to this work benefit you? Let us know!

Repository Citation

Forte, David, "The Faith and Morals of Justice Antonin Scalia" (2019). *Law Faculty Articles and Essays*. 1104.

https://engagedscholarship.csuohio.edu/fac_articles/1104

This Article is brought to you for free and open access by the Faculty Scholarship at EngagedScholarship@CSU. It has been accepted for inclusion in Law Faculty Articles and Essays by an authorized administrator of EngagedScholarship@CSU. For more information, please contact research.services@law.csuohio.edu.

THE FAITH AND MORALS OF JUSTICE ANTONIN SCALIA

DAVID F. FORTE*

Both admirers and critics call Antonin Scalia the most influential Supreme Court justice in the last half century.¹ He made originalism² a legitimate tool of analysis for previously recalcitrant justices.³ Today, originalism is the stuff of the advocate's brief.⁴ Antonin Scalia schooled his colleagues in the art of textual analysis,⁵

* Professor of Law, Cleveland State University Cleveland-Marshall College of Law; B.A., Harvard College; M.A., University of Manchester; J.D., Columbia University; Ph.D., University of Toronto. I am grateful for the advice of Dr. Michael Uhlmann and for the assistance of the staff of the Cleveland-Marshall School of Law Library. The conclusions are the author's.

¹ Jeffrey Rosen, *What Made Antonin Scalia Great*, THE ATLANTIC (Feb. 12, 2016), <https://www.theatlantic.com/politics/archive/2016/02/what-made-antonin-scalia-great/462837>; George Weigel, *After Justice Scalia*, FIRST THINGS (Feb. 24, 2016), <https://www.firstthings.com/web-exclusives/2016/02/after-justice-scalia>.

² Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CINN. L. REV. 849, 854 (1989) ("Central to that analysis [John Marshall's defense of judicial review in *Marbury v. Madison*], it seems to me, is the perception that the Constitution, though it has an effect superior to other laws, is in its nature the sort of 'law' that is the business of the courts—an enactment that has a fixed meaning ascertainable through the usual devices familiar to those learned in the law") [hereinafter *Originalism*]. In other words, all that originalism requires is a standard method of *statutory* interpretation (as opposed to common-law interpretation) that lawyers in the Anglo-American tradition have long been expert in. *See generally* ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW (1997).

³ *See, e.g.*, Justice John Paul Stevens' opinions in *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995) and *District of Columbia v. Heller*, 554 U.S. 570, 636 (2008) (Stevens, J., dissenting). Justice Hugo Black has been termed a "liberal originalist," though it would seem more accurate to call him a "liberal textualist." Cass R. Sunstein, *Originalism for Liberals*, THE NEW REPUBLIC (Sept. 28, 1998), <https://newrepublic.com/article/64084/originalism-liberals> (reviewing Akil Reed Amar, *THE BILL OF RIGHTS* (1998), and Akhil Reed Amar & Alan Hirsch, *FOR THE PEOPLE* (1998)).

⁴ Adam Winkler, *Originalism: It's not just for conservatives anymore*, SCOTUSBLOG (Aug. 14, 2013), <http://www.scotusblog.com/2013/08/originalism-its-not-just-for-conservatives-anymore/>.

⁵ *See generally* Jonathan R. Siegel, *The Legacy of Justice Scalia and His Textualist Ideal*, 85 GEO. WASH. L. REV. 857 (2017).

and today, justices gloss a text as never before.⁶ “Justice Scalia’s powerful arguments for originalism and textualism changed the way all justices, liberal and conservative, approached cases,” declared Professor Aziz Huq of the University of Chicago Law School.⁷ And he over and over again called his colleagues to task for exceeding their mandate. What lay behind the singular influence of this man—an influence made more by his dissents than his majority opinions?

Not since Oliver Wendell Holmes, Jr. has a justice’s contrariness figured so much in the development of constitutional law. Both Holmes and Scalia thought that judges ought to get out of the way of the other branches of government—Holmes because his skepticism led him to think judges were not capable of making decisions on great social issues,⁸ Scalia because he thought the Constitution did not give him the right to make such decisions in the first place.⁹

How did it come to be that the skeptic and the religious adherent were so close? Both men were intellectuals, experts in common law reasoning,¹⁰ scions of their families, sons of respected men of letters. Both were prodded to success by demanding accomplished fathers.¹¹ Both found their voice in ringing dissents.

⁶ See, e.g., Justice Elena Kagan’s opinion in *Advocate Health Care Network v. Stapleton*, 137 S. Ct. 1652 (2017), and Justice Neil Gorsuch’s opinion in *Henson v. Santander Consumer USA, Inc.*, 137 S. Ct. 1718 (2017). The contending opinions of Justices Sotomayor and Kagan in case of *Lockhart v. United States*, 136 S.Ct. 938 (2016), fought over the application of the “rule of the last antecedent” to a three word phrase in a federal criminal statute.

⁷ Jeremy Manier, *Antonin Scalia, Supreme Court justice and former UChicago law professor, 1936-2016*, UCHICAGO NEWS, <https://news.uchicago.edu/story/antonin-scalia-supreme-court-justice-and-former-uchicago-law-professor-1936-2016>.

⁸ David F. Forte, *The Making of the Modern Supreme Court: Oliver Wendell Holmes, Jr., and Louis D. Brandeis*, in *HISTORY OF AMERICAN POLITICAL THOUGHT* 602, 607 (Bryan-Paul Frost & Jeffrey Sikkenga eds., 2d ed. 2019).

⁹ ANTONIN SCALIA, *SCALIA SPEAKS: REFLECTIONS ON LAW, FAITH AND LIFE WELL LIVED* 169-75 (Christopher Scalia, & Edward Whelan eds., 2017).

¹⁰ See generally OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* (1881); ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* (2012).

¹¹ Holmes’ father, Oliver Wendell Holmes, Sr., was a celebrated essayist. G.

Both crafted quotable aphorisms. Both had circles of close friends. Both excited adulation. Both incurred enmity.

Yet Holmes was a relativist, while Scalia thought that reason could reach the truth. Holmes believed that religion was so much superstition. Scalia believed that religion pointed to a transcendent reality. Holmes was diffident. Scalia impertinent. Holmes was a Boston Brahmin from Beacon Hill. Scalia was an Italian kid who grew up in Queens.

But they shared much. For one thing, Holmes and Scalia took a puckish delight in upholding laws they never would have otherwise supported. Holmes once wrote: “It has given me great pleasure to sustain the Constitutionality of laws that I believe to be as bad as possible.”¹² Scalia famously declared: “If it were up to me, I would put in jail every sandal-wearing, scruffy-bearded weirdo who burns the American flag. But I am not king.”¹³ Yet Scalia was certain that the First Amendment protects the kind of contempt for the government and its symbols that flag burning represents.¹⁴

We can easily understand how the free-thinking Holmes would be suspicious of judges who strayed off into popular social and economic theory. He was equally disdainful of progressives and laissez faire apologists.¹⁵ But what of Scalia? How could a man who had utter confidence in the reality of absolute truth find himself on the same ground as the skeptical Holmes?

The puzzle is deepened when we see that Scalia actually shared Holmes’ historicist view of the common law. In 1881, when Holmes published his seminal work, *The Common Law*, he penned a phrase in

EDWARD WHITE, *JUSTICE OLIVER WENDELL HOLMES: LAW AND THE INNER SELF* 9-14 (1993). Scalia’s father was a respected Professor of Romance Languages. JOAN BISKUPIC, *AMERICAN ORIGINAL: THE LIFE AND CONSTITUTION OF SUPREME COURT JUSTICE ANTONIN SCALIA* 13-17 (2009).

¹² LOUIS MENAND, *THE METAPHYSICAL CLUB* 67 (2001).

¹³ *Antonin Scalia Explains Why Americans Can Burn the Flag*, HEAVY.COM (Nov. 29, 2016), <https://heavy.com/news/2016/11/watch-antonin-scalia-flag-burning-donald-trump-video-justice-say-about-first-amendment-freedom-of-speech> h.

¹⁴ ANTONIN SCALIA, *supra* note 9, at 207.

¹⁵ G. EDWARD WHITE, *supra* note 10, at 320.

its opening paragraph that has likely been the most oft-quoted aphorism in American legal language: “The life of the law has not been logic: it has been experience.” He further developed his thesis:

The felt necessities of the time, the prevalent moral and political theories, institutions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed.¹⁶

One might think that Holmes’ view that the law must adapt to “the felt necessities of the time” was precisely what was anathema to Scalia, more especially because Holmes has often been credited with being the progenitor of the School of Legal Realism, a view of the law that Scalia could not abide by.¹⁷

Nonetheless, in truth, Scalia accepted the Holmesian view of the common law—that it was, in fact, law created by judges. Scalia declared, “The common law is *judge-made* law, crafted and refined by judges over time to fit the needs of a changing and developing society.”¹⁸ Scalia could have embraced a pre-Holmesian notion of the common law, for until Holmes, even though they repaired to experience, judges nonetheless still saw law as a “given,” and they believed that they were interpreting it within a larger framework. That overarching framework was, as has been famously noted, part of a “higher law” tradition, including, to some degree, an appreciation of the natural law within.¹⁹ But both Holmes and Scalia derided the natural law. In 1915, Holmes wrote an essay that constituted a frontal attack on the tradition from the avowed perspective of skepticism. For Holmes, one’s preferences were the only touchstone of reality. Natural lawyers, he argued, were “in that naïve state of mind that

¹⁶ HOLMES, *THE COMMON LAW* 1 (1881).

¹⁷ At Harvard Law School, Scalia was exposed to a movement that disdained Legal Realism in favor of “legal process” and neutral principles of law.” RICHARD A BRISBAIN, JR., *JUSTICE ANTONIN SCALIA AND THE CONSERVATIVE REVIVAL* 14-15 (1997).

¹⁸ ANTONIN SCALIA, *supra* note 9, at 174 (emphasis in original).

¹⁹ See generally EDWIN S. CORWIN, *THE “HIGHER LAW” “BACKGROUND OF AMERICAN CONSTITUTIONAL LAW* (1971).

accepts which has been familiar and accepted by them and their neighbors as something that must be accepted by all men everywhere.”²⁰

But here also, Scalia was at one with Holmes. He too disdained the natural law. Although Hadley Arkes has detected natural law underpinnings in Scalia’s reasoning,²¹ Scalia himself claimed to have no truck with the system of natural law, at least as a grounding for making judicial decisions. No matter how objective natural law might be, Scalia, like Justice Hugo Black before him, thought that in the hands of judges, “natural law” would be but an excuse for interposing one’s subjective policy preferences into the law. As Black put it in *Adamson v. California*:²² “This decision reasserts a constitutional theory . . . that this Court is endowed by the Constitution with boundless power under ‘natural law’ periodically to expand and contract constitutional standards to conform to the Court’s conception of what at a particular time constitutes ‘civilized decency’ and ‘fundamental liberty and justice.’”²³ Similarly, Justice Scalia wrote: “Do you really want judges—fallible judges—going about enforcing their vision of natural law, contrary to the dictates of democratically enacted positive law? Lord, no.”²⁴ For Scalia, a discretionary approach to judging, whether it be the natural law or the common law, was inappropriate for an appellate court, at least for a court at the highest constitutional level. For Scalia, the nature of

²⁰ OLIVER WENDELL HOLMES, JR., *THE COLLECTED WORKS OF JUSTICE HOLMES* 446 (Sheldon Novick ed. 1995).

²¹ Hadley Arkes, *The Self-Made Trap*, CLAREMONT.ORG (Fed. 23, 2016), <https://www.claremont.org/crb/article/the-self-made-trap> (“Was Scalia revealing, yet again, that he had been “speaking prose” all his life—that he had been offering us handsome examples of natural law reasoning for many years, while insisting to us that it couldn’t be done?”); Hadley Arkes, *Antonin Scalia: A Spirited Life in the Law*, NATIONAL REVIEW (Feb. 16, 2016), <https://www.nationalreview.com/2016/02/antonin-scalias-jurisprudence> (“Scalia was a relentless logician, and as he sought the logic behind the text he would persistently find himself reasoning back to those principles that were not in the text”).

²² 332 U.S. 46 (1947).

²³ *Id.* at 69 (Black, J. dissenting) (citations omitted).

²⁴ ANTONIN SCALIA, *supra* note 9, at 248.

law—at least, statutory law and constitutional law—was positivistic.²⁵ Its validity derived from the will of the democratic electorate.

As Justice Scalia would not have the judge be a philosopher of natural law, still less would he want a judge to be a historian of natural law. History (and he attacked the use of legislative history in particular)²⁶ was as capable of being manipulated to affirm a judge's prejudices as was philosophy.²⁷ Even when Scalia was forced to have recourse to history, in order to discern a constitutional principle, he did so on the most narrow possible grounds. In *Michael H. v. Gerald D.*,²⁸ the Supreme Court had to decide whether to uphold California's presumption that the husband (Gerald D.) of a married woman who had given birth was the father of the child against the claim of the woman's lover (Michael H.) that he was a biological father. The lover claimed a due process liberty interest in visitation rights to the child. Following precedent that required that a liberty interest be one that is "traditionally protected by our society,"²⁹ Scalia found for the husband. He determined that there was no such historical liberty interest in the lover's claim, but that, on the contrary, the presumption of the husband's paternity is part of "[t]he historic respect -- indeed, sanctity would not be too strong a term -- traditionally accorded to the relationships that develop within the unitary family."³⁰ In a controversial footnote, Scalia argued that when the Court must resort to history to inform its decision, it must consult "the most specific tradition available." "[G]eneral traditions," on the other hand, he wrote, "provide such imprecise guidance, [that] they permit judges to dictate rather than discern the society's views."³¹

²⁵ See generally Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989). See also Beau J. Brock, *Mr. Justice Antonin Scalia: A Renaissance of Positivism and Predictability in Constitutional Adjudication*, 51 LA. L. REV. 623 (1991). George Kannar terms Scalia's approach a "profoundly positivist and textualist vision." George Kannar, *The Constitutional Catechism of Antonin Scalia*, 99 YALE L. J. 1297, 1307 (1990).

²⁶ ANTONIN SCALIA SPEAKS, *supra* note 9, at 236-42.

²⁷ Originalism, *supra* note 2, at 864.

²⁸ 491 U.S. 110 (1989).

²⁹ *Id.* at 122.

³⁰ *Id.* at 123.

³¹ *Id.* at 127 (n. 6). Justices O'Connor, Kennedy, and Brennan took issue with

It is because of Justice Scalia's suspicion of philosophy and of history that he becomes an outspoken textualist.³² But why should text carry greater authority? Why should the written word, rather than evolving tradition, be of higher authority, particularly to a Roman Catholic? To understand Antonin Scalia's affirmation of the centrality of text, we must, as many already have, seek to find out how the man viewed his religion and how he practiced it.

II

Antonin Scalia was neither the first, nor the last, Catholic appointed to the Supreme Court, but he was the most outspoken about his faith off the bench. Many observers have, in fact, remarked on the man's Catholicism, but often with inaccurate reductionism. For example, in his critical biography, Bruce Alan Murphy repeatedly declares that Scalia was part of "the new Catholic majority" that was able to exert its influence on constitutional law beginning in 2007, because of the shared religious beliefs of the five of its members.³³ When Professor Geoffrey Stone of the University of Chicago Law School (and former faculty colleague of Scalia's) made the same claim that it had been the religion of the Catholic majority that had decided the partial birth abortion case,³⁴ Scalia was so outraged at Stone that

Scalia's narrow methodology.

³² Even though Justice Scalia agreed with Justice Black's distrust of natural law reasoning, Scalia believed that Black was an inadequate textualist. Black had thought that the First Amendment's phrasing that began "Congress shall pass no law" was an absolute prohibition on any legislation that restricted freedom of speech. But Scalia emphasized that the First Amendment does *not* say that government shall not abridge freedom of speech. It says that government shall not abridge 'THE freedom of speech'—that is, that freedom of speech which was the understood right of Englishmen." ANTONIN SCALIA, *supra* note 9, at 203-04 (emphasis in original). And Black, Scalia declared, never did any work to find out what the historic meaning of the phrase actually was. *Id.* at 205.

³³ BRUCE ALLEN MURPHY, *SCALIA: A COURT OF ONE* 361-63 (2015).

³⁴ *Gonzalez v. Carhart*, 550 U.S. 124 (2007). Geoffrey R. Stone, *Stone on Faith Based Justices*, LAW.UCHICAGO.EDU (April 30, 2007), <https://www.law.uchicago.edu/news/stone-faith-based-justices>.

he exclaimed, “Now, he knows that’s a damn lie.”³⁵ Scalia pledged, “I will not appear at the University of Chicago until he is no longer on the faculty.”³⁶ Later, Scalia and Stone reconciled, and in 2012, Scalia gave a well-received lecture at the University of Chicago Law School. Shortly before he died, Scalia wrote Stone a note thanking him, when Stone had publicly defended Scalia on another controversial matter.³⁷

Murphy’s and Stone’s view—and they are not the only ones³⁸—comes from equating Catholicism with a political ideology. It is a perspective, once Protestant³⁹ and now secular,⁴⁰ that has distorted American views of Catholicism for over two centuries.⁴¹ Scalia always took the deepest personal umbrage at charges that he was a results-oriented judge, and a *Catholic* results-oriented judge to boot. He asserted that an “evolving constitutionalist” would utilize his personal views, including his religious views, to guide his interpretation. But a textualist (like Scalia) tries to keep himself immune from such temptations.⁴²

Many other observers have said that Scalia was a

³⁵ JOAN BISKUPIC, *supra* note 11, 204.

³⁶ *Id.*

³⁷ Stone stated: “Two months ago, after he made some controversial comments from the bench during oral argument in an affirmative action case, I wrote an op-ed defending his questioning. He very graciously emailed me to thank me. That was, sadly, my last personal contact with him.” Geoffrey R. Stone, *Tough, Brilliant, and Kind: The Antonin Scalia I Knew*, DAILY BEAST, February 14, 2016, <https://www.thedailybeast.com/tough-brilliant-and-kind-the-antonin-scalia-i-knew>.

³⁸ As an example, Senators Mazie Hirono and Kamala Harris have recently questioned the objectivity of a nominee to the federal bench because he is a member of the Knights of Columbus. Ed Condon, *Judicial nominee faces Senate scrutiny over Knights of Columbus membership*, CATHOLIC NEWS SERVICE (Dec. 21, 2018), <https://www.catholicnewsagency.com/news/senators-quiz-nominee-about-membership-of-extreme-knights-of-columbus-78683>.

³⁹ See, e.g., LYMAN BEECHER, *A PLEA FOR THE WEST* (1835).

⁴⁰ See, e.g., PAUL BLANSHARD, *AMERICAN FREEDOM AND CATHOLIC POWER* (1949).

⁴¹ Phillip Hamburger, *A Dismal Tradition*, FIRST THINGS (Jan. 11, 2019), <https://www.firstthings.com/web-exclusives/2019/01/a-dismal-tradition>; Sanford Levinson, *The Confrontation of Religious Faith and Civil Religion: Catholics Becoming Justices*, 39 DEPAUL L. REV. 1047 (1990).

⁴² JOAN BISKUPIC, *supra* note 11, at 209.

“conservative Catholic” or a pre-Vatican II Catholic, and that explains him.⁴³ George Kannar, for example, attempts to solve the riddle of why a Catholic judge, rather than a Protestant judge, should be so beholden to the text. Kannar traces Scalia’s “sola scriptura” attitude to being a pre-Vatican II Catholic, subject to the literalism of *The Baltimore Catechism*.⁴⁴ Although Kannar understands the religious culture in which Scalia was raised and which he embraced, others doubt that the pre-Vatican Catholic culture was what made him so insistent on text and originalism. Donald J. Beschle, for example, points out that Catholic justices, like Frank Murphy, were raised in the same milieu and were equally beholden to their faith, but had a far different interpretive mien.⁴⁵

What Kannar and Beschle and others do understand, however, was the passionate devotion Antonin Scalia had for his faith. Antonin Scalia was a truly *devout* Catholic—not a cafeteria Catholic, not a Christmas and Easter Catholic, not even a once a week Sunday Catholic. And, for Scalia, to be a devout Catholic makes one neither a conservative nor a liberal. That is why he objected so vehemently to those who charged that he was importing either political or religious policy positions into his judging. And why he was embarrassed when opponents of abortion commended him on his stand:

I must tell them that I deserve no thanks; that my position is not a virtuous affirmation of my religious belief, or even a sagacious policy choice, but simply the product of lawyerly analysis of constitutional text and tradition; and that if legal analysis had produced the opposite conclusion I would have come out the opposite way, regardless of their or my views

⁴³ Murphy is typical: “Indeed, for Scalia, there were strong similarities between the literal reading of biblical text and the use of historical sources to interpret Scripture in the pre-Vatican II Catholic faith, and the historically based dictionary technique for interpreting the Constitution in his originalist/textualist philosophy.” BRUCE ALLEN MURPHY, *supra* note 33, at 366.

⁴⁴ Kannar, *supra* note 25, at 1313.

⁴⁵ See generally Donald J. Beschle, *Catechism or Imagination: Is Justice Scalia’s Judicial Style Typically Catholic?*, 37 VILL. L. REV. 1329 (1992).

concerning abortion.⁴⁶

III

So let us enquire what part or parts of Scalia's Catholicism might have accounted for his particular style of judging and why he believed that originalism and textualism were morally required of judges. We can say that the fundamental elements that constitute Catholicism are beliefs (doctrines and dogmas), devotions (including prayers and the sacraments), moral imperatives (which include good works and vocation), and Church (hierarchical authority). The last, the hierarchical authority of the Church, defines beliefs, administers devotions, and teaches morality. That function of the Church is termed its Magisterium, or teaching office.⁴⁷ The Catholic Catechism describes the Magisterium as,

The task of giving an authentic interpretation of the Word of God, whether in its written form or in the form of Tradition, has been entrusted to the living office of the Church alone. Its authority in this matter is exercised in the name of Jesus Christ. This means that the task of interpretation has been entrusted to the bishops in communion with the successor of Peter, the Bishop of Rome.⁴⁸

It is the glue that holds this temporal institution, its mission, and its adherents together.

For a devout Catholic, to live one's religion means: (1) fidelity to the Magisterium; (2) worship and prayer; (3) constant introspection, meditation, and self-evaluation; (4) moral living and the practice of charity; and (5) a commitment to a unique vocation. If we can see how Antonin Scalia approached each of those elements of his faith, we may

⁴⁶ ANTONIN SCALIA, *supra* note 9, at 152.

⁴⁷ See generally AVERY DULLES, *MAGISTERIUM: TEACHER AND GUARDIAN OF THE FAITH* (2010).

⁴⁸ *Catechism of the Catholic Church*, Pt. I. Sec. 1, ch. 2, art. 3, par. 85, VATICAN.VA, http://www.vatican.va/archive/ENG0015/_PM.HTM#84 (last visited March 29, 2019) [hereinafter *Cathechism*].

be able to discern why he was such a passionate apologist for originalist textualism.

In his early childhood years, Antonin Scalia's parents enrolled him in public school in Queens. But at Xavier High School in lower Manhattan, he received a thorough Jesuit Catholic education. He excelled and graduated as valedictorian. All agree that the rigor of the place profoundly affected Scalia. His religious devotions were extensive; his Catholic identity prominent to those around him.⁴⁹

He went on to Georgetown University, which was not then the secular clone it was later criticized as becoming. In the 1950s, Georgetown was a conservative Jesuit Catholic institution. Here too, Scalia's Catholic faith remained strong. Here too, he triumphed scholastically and became valedictorian. He majored in history, though he was later to become suspicious of historical research as a guide to determining what a legal rule should be. He had become very self-confident, but at his oral comprehensive exams, he was given a dose of humility. After answering a number of questions with skill and competence, he later recalled, the examiner said, "Very good, Mr. Scalia. I have one last question: If you look back over all the history that you've studied here over the last four years, if you had to pick one event that you thought was the most significant, what would it be?" Scalia could not recall what he answered in response, but he did remember his questioner's reaction. "[H]e shook his head sadly and said, 'No, Mr. Scalia. The Incarnation, Mr. Scalia.'" The lesson that Scalia said he learned from this encounter: "[N]ot to separate your religious life from your intellectual life."⁵⁰

One would think that the product of such an education would have a particular loyalty to the Magisterium and to authorities that the Church holds up as exemplary. During his time on the Supreme Court, Scalia spoke frequently before university chapters of the St. Thomas More Society (he had been a member while at Georgetown), and at these talks, he repeatedly affirmed a strong confession of faith. He took the lesson given him at his comprehensive finals to preach a humble acceptance of faith, even though fidelity to the tenets of

⁴⁹ JOAN BISKUPIC, *supra* note 11, at 21-22.

⁵⁰ *Id.* at 25.

Christianity inevitably makes one an outcast, a simpleton, in the eyes of the secular elites.

To believe, first and foremost, that Jesus Christ *was God*. (Why the notion that the Creator should become a bull is as unsophisticated as the notion that Zeus should become a bull.) Or to believe that he was born of a virgin. (Well, I mean, Really!) That he actually, physically, rose from the grave. That he founded a church with the power to bind and loose—to pronounce, authoritatively, the will of God for mankind. That, as he taught, hardship and suffering are not to be avoided at all costs but are to be embraced and indeed even sought after—as penance for sin, and as a means of sharing in the crucifixion of Christ. (How utterly ridiculous to forego legitimate pleasures and to seek discomfort! How absurd the vow and chastity and the hair shirt!) Or the belief in miracles as at Lourdes and Fatima. Or, finally, the belief that those who love God and obey his commands will rise from the dead, in their bodies, and be happy with him forever in heaven; and that those who do not will burn in hell.⁵¹

True to his prediction, his witness was widely castigated by critics,⁵² but that did not dissuade him from repeating his attachment to his beliefs before other audiences.⁵³ One friend said of him, “I think his faithful belief in Catholic doctrine is what makes him run. I think he is a true believer.”⁵⁴

His outspokenness was a product of his personality, his intelligence, and his upbringing. But it was also clearly a product of his faith. While at Georgetown University, he spent his junior abroad in Switzerland. He reported, “On the way back home, I spent some time in England, and I remember going to Hyde Park Corner. And there was a Roman Catholic priest in his collar, standing on a soapbox, preaching the Catholic faith and being heckled by a group. And I thought, *My goodness*. I thought that was admirable. I have often bemoaned the fact that the Catholic Church has sort of lost that

⁵¹ ANTONIN SCALIA, *supra* note 9, at 108.

⁵² Michael Stokes Paulsen & Steffen N. Johnson, *Scalia's Sermonette*, 72 NOTRE DAME L. REV. 863, 864-65 (1997).

⁵³ See, for example, his talk before The Judicial Prayer Breakfast Group. ANTONIN SCALIA, *supra* note 9, at 117.

⁵⁴ JOAN BISKUPIC, *supra* note 11, at 187.

evangelistic spirit.”⁵⁵ In that sense he was at one with the call for a “new evangelization”⁵⁶ of the recent popes despite his public disagreement with them on the issue of capital punishment.

One should have expected that Scalia’s witness to the tenets of Christian Catholicism would also make him a follower of other authoritative sources of the Church’s teachings, such as papal pronouncements or figures such as St. Thomas Aquinas. But Scalia’s affirmation of the Church’s Magisterium did not mean that he always accepted the hierarchy’s interpretation of the corpus of the Magisterium, even when that hierarchy included the Pope. The rigor of his education had actually equipped him to contest authoritative figures in the Church. In some ways, Antonin Scalia was more Catholic than the Pope—literally. He famously contested Pope St. John Paul II’s stand on capital punishment. In his encyclical, *Evangelium Vitae*, the Pope had stated in regard to the death penalty,

It is clear that, for these purposes to be achieved, the nature and extent of the punishment must be carefully evaluated and decided upon, and ought not go to the extreme of executing the offender except in cases of absolute necessity: in other words, when it would not be possible otherwise to defend society. Today however, as a result of steady improvements in the organization of the penal system, such cases are very rare, if not practically non-existent.⁵⁷

The Catechism of the Catholic Church, published in 1992, had evinced a similarly limited acceptance of the death penalty.

Assuming that the guilty party’s identity and responsibility have been fully determined, the traditional teaching of the Church does not exclude recourse to the death penalty, if this is the only possible way of effectively defending human lives against the unjust

⁵⁵ Maureen Fiedler, *Justice Antonin Scalia: a very traditional Catholic*, NATIONAL CATHOLIC REPORTER (Feb. 15, 2016), <https://www.ncronline.org/blogs/ncr-today/justice-antonin-scalia-very-traditional-catholic>.

⁵⁶ *What is the New Evangelization?*, UNITED STATES CONFERENCE OF CATHOLIC BISHOPS, <http://www.usccb.org/beliefs-and-teachings/how-we-teach/new-evangelization/index.cfm> (last visited March 29, 2019).

⁵⁷ Pope John Paul II, Encyclical Letter, *Evangelium Vitae* ¶ 56 (Mar. 25, 1995).

aggressor.⁵⁸

But Antonin Scalia was not persuaded. In fact, he thought that the Pope was flat out wrong, and even quoted St. Paul against him.⁵⁹ Restating what has been the traditional Catholic position on the authority of the Pope, Scalia declared:

I am therefore happy to learn from the canonical experts I have consulted that the position set forth in *Evangelium Vitae* and in the latest version of the Catholic catechism does not purport to be binding teaching—that is, it need not be accepted by practicing Catholics, though they must give it thoughtful and respectful consideration . . . So I have given this new position thoughtful and careful consideration—and I disagree.⁶⁰

Scalia defended his position that capital punishment was “not immoral” because punishment as a just retribution for immoral actions is not only divinely sanctioned (Christ’s atonement for sins against God is the “type” that authorizes the moral validity of retributive capital punishment by those in political authority) but retribution for moral harms is also the (natural?) understanding of people in general.⁶¹

Conservative churchmen of respected authority such as Avery Dulles and Bishop Charles J. Chaput) defended the change in the Pope’s teaching and retorted sharply to Scalia.⁶² Bishop Chaput went so far as to equate Scalia’s dissention from the newly articulated teaching on capital punishment with Catholics who dissent from the Church’s teaching on abortion.⁶³ Subsequently Pope Francis has

⁵⁸ Catechism, *supra* note 48, at Pt. III, Sec. 2, ch. 2, art. 5, para. 2267.

⁵⁹ Antonin Scalia, *God’s Justice and Ours*, FIRST THINGS (May 2002), <https://www.firstthings.com/article/2002/05/gods-justice-and-ours>.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² Antonin Scalia and his Critics: *The Church, the Courts, and the Death Penalty*, FIRST THINGS (October 2002), <https://www.firstthings.com/article/2002/10/antonin-scalia-and-his-critics-the-church-the-courts-and-the-death-penalty>.

⁶³ *Id.*

revised the Catechism even further to state that use of the death penalty is now “inadmissible.”⁶⁴ One might think that, were Justice Scalia still alive, he would continue his disagreement with the man who sits in the Chair of Peter. On the other hand, when Scalia was asked about Pope Francis’s views (Francis became Pope eleven months before Scalia’s death), Scalia answered, “He’s the Vicar of Christ. He’s the chief. I don’t run down the pope.”⁶⁵

Not only was Scalia unafraid to contest the successor to Saint Peter, but, as we shall see below, he had no hesitation to dispute St. Thomas Aquinas. Thus, to those who define Scalia simply as a pre-Vatican II Catholic, he certainly did not fit the stereotype as an uncompromising follower of papal or even Thomistic authority.

What of the other elements of the man’s Catholicity? Antonin Scalia was certainly a worshipful and prayerful man. He frequently attended daily Mass, and often sat quietly afterwards doing his spiritual reading for the day. At his funeral Mass, his son, Father Paul Scalia, said of him, “He treasured the Church’s ceremonies, especially the beauty of her ancient worship. He trusted the power of the Sacraments as the means of salvation—as Christ working within him for his salvation.”⁶⁶

The “ancient worship” that Father Scalia was referring to was the Latin Mass. Antonin Scalia would travel far to be able to attend a Latin Mass, as was available at St. Matthew’s Cathedral in Washington, or even the older Tridentine rite observed at parish churches. He had a number of face-to-face disputes with priests, whether it be a “smart-ass young Jesuit” or “some crazy Dominicans,” who had either belittled Catholic doctrine from the pulpit, or

⁶⁴ Edward Pentin, *Pope Francis Changes Catechism to Say Death Penalty ‘Inadmissible,’* NATIONAL CATHOLIC REGISTER (Aug. 2, 2018), <http://www.ncregister.com/blog/edward-pentin/pope-francis-changes-catechism-to-declare-death-penalty-inadmissible>.

⁶⁵ Michael O’Loughlin, *Scalia was a champion of traditional Catholicism*, CRUX (Feb. 14, 2016), <https://cruxnow.com/faith/2016/02/14/scalia-was-a-champion-of-traditional-catholicism/>.

⁶⁶ Paul Scalia, *Funeral Homily for Justice Antonin Scalia*, FIRST THINGS (Feb. 2, 2016), <https://www.firstthings.com/web-exclusives/2016/02/funeral-homily-for-justice-antonin-scalia>.

bowdlerized the Mass from the altar.⁶⁷ In a speech to the Knights of Columbus, he praised “‘traditional Catholics’ who say the Rosary, go on pilgrimages, kneel during the Eucharist, and ‘follow religiously the teachings of the Pope.’”⁶⁸ Commenting on Scalia’s love of traditional architecture and worship in the Church, Leonard Leo concluded, “What those outward manifestations allow him to do is to focus on faith and to achieve a level of spirituality.”⁶⁹ That faith included frequent retreats (“Any person who believes in the transcendental has to go on a retreat periodically”),⁷⁰ and when he could, Mass during the week.

These faithful practices brought forth a man of charity, which conclusion might seem misapplied to one who had no hesitation in denigrating his colleagues’ opinions, reporters’ assumptions, and lukewarm priests’ insults to the faith and liturgy. But his oft-cited friendship with Ruth Bader Ginsburg was no aberration. When called upon to battle Justice Ginsburg in the forum of the Court’s adjudications, he did so. But there was a genuine love between the two. In that sense, Scalia followed Christ’s command to “love your enemies,”⁷¹ that is, to see and know one’s opponent as a person, even though she might necessarily have to be an enemy also. Ginsburg said of her friend, “[H]e attacked ideas, not people.”⁷²

His charity extended to strangers. Shortly after his death, Jeffrey A. Tucker, a businessman in the Washington area, revealed the following vignette:

It was a spring afternoon some years ago, and he was attending church services, sitting in a back pew, holding his prayer book in his hands. The Mass had ended and most people had gone. He was still saying prayers, alone in the back pew.

He finally got up and began to walk out. There were no

⁶⁷ JOAN BISKUPIC, *supra* note 11, at 186-87.

⁶⁸ *Id.* at 188.

⁶⁹ *Id.* at 187.

⁷⁰ ANTONIN SCALIA SPEAKS, *supra* note 9, at 145.

⁷¹ MATTHEW 5:44; LUKE 6:27

⁷² Ruth Bader Ginsburg, *Foreword*, in SCALIA SPEAKS, *supra* note 9, at x.

reporters, nobody watching. There was only a woman who had been attending the same services. She had no idea who he was. I was a bystander, and I'm certain he didn't know I was there.

What was a bit unusual about this woman: she had lashing sores on her face and hands. They were open sores. There was some disease, and not just physically. She behaved strangely, a troubled person that you meet in large cities and quickly walk away from. A person to avoid and certainly never touch.

For whatever reason, she walked up to Justice Scalia, who was alone. He took her hands, though they were full of sores. She leaned in to say something, and she began to cry.

He held her face next to his, and she talked beneath her tears that were now streaming down his suit. He didn't flinch. He didn't try to get away. He just held her while she spoke. This lasted for perhaps more than 5 minutes. He closed his eyes while she spoke, gripping her back with his hand.

He didn't recoil. He stood there with conviction. And love.

There were no cameras and no other onlookers besides myself, and he had no idea I was there.

Finally she was finished. What he said comforted her, and she gained composure. She pulled away, ready to go. He held her rough, sore-filled hands and had a few final words that I could not hear. He gave her some money.

And then she walked away.

And then he walked away, across the green grass, toward the Supreme Court building, alone. He was probably preparing for an afternoon of work.⁷³

⁷³ Jeffrey A. Tucker, *Justice Scalia's Great Heart*, FEE (Feb. 13, 2016), <https://fee.org/articles/justice-scalia-s-great-heart/>.

IV

Where then do we find the intersection of Antonin Scalia's actions as a judge and as a loyal believer in the tenets of the Catholic faith? How do we reconcile his assertions that his faith never dictated to him a substantive outcome to a case with his personal rule "not to separate your religious life from your intellectual life?"

It is, perhaps, in Scalia's understanding of the Catholic notion of vocation. Scalia often stated, "There is no such thing as a Catholic judge," just as there is no such thing as "a Catholic way to cook a hamburger."⁷⁴ But even according to his own lights, Scalia would have to affirm that there must be a Catholic way of cooking a hamburger, and he sometimes did so. "No matter how good a Catholic a short-order chef may be, for example, there is no such things as a Catholic hamburger. Unless, of course, it is a perfectly made and perfectly cooked hamburger."⁷⁵ Equally for Scalia, there was only a good judge and one who was not: a faithful judge, or one who was not. "Just as there is no Catholic way to cook a hamburger, so also is there no Catholic way to interpret a text, analyze a historical tradition, or discern the meaning and legitimacy of prior judicial decisions—except, of course, to do those things *honestly* and *perfectly*."⁷⁶

To arrive at one's understanding of one's proper role requires serious self-evaluation. It is not just in the Sacrament of Confession that the Catholic must evaluate himself and own up to his frailties. It is in all the devotions of the Church: the rosary, pilgrimages, retreats, missions, scriptural study, days of recollection and in spiritual reading. All these things Scalia did.

It is in these activities that a person develops what the Church calls an informed conscience, that is, a conscience that has been developed to meet ethical problems in a deeply principled way, and not just based on intuition and feeling. One of Scalia's favorite saints,

⁷⁴ Robert T. Miller, *Antonin Scalia: Not at Catholic (Judge)*, FIRST THINGS (Oct. 23, 2007), <https://www.firstthings.com/web-exclusives/2007/10/antonin-scalia-not-a-catholic>.

⁷⁵ ANTONIN SCALIA, *supra* note 9, at 149.

⁷⁶ *Id.* at 152 (emphasis in original).

St. Thomas More, exemplified for him such an informed conscience.

Scalia recalled an earlier example of what this practice of self-examination requires:

[In high school], one of my classmates—I remember his name, Antonelli—volunteered some criticism of *Hamlet*. Very sophomoric, of course. Fr. Matthews looked at him with a steely glaze, and said to him in his Boston accent, “Mister, when you read Shakespeare, Shakespeare’s not on trial, *you* are.” I have always thought that a very good principle useful in many areas of life, including the law. What Shakespeare is to high school students, a society’s long-established traditions are to the jurist. He does not judge them; he is judged by them.⁷⁷

Such internal exercises lead one to the practice of what the Church calls discernment, that is, deciding what is the unique role given to you by God in any particular stage in life, that is, what your vocation, or your calling is. Scalia, as many of us do, had a number of vocations: lawyer, teacher, government servant, husband (and then father), and judge. But each successive role did not just happen to him; he thoughtfully chose it. Discernment impels one to choose.

Once, for example, in answer to a question, Scalia wryly homed in on the essence of the vocation of marriage. A woman once declared to him, “Justice Scalia, you must love children.” “Why do you say that?” “Because you have so many of them.” “That doesn’t show that I love children. That shows that I love my wife.”⁷⁸ His Radcliffe-educated wife Maureen had a better response: “We are both overachievers.”⁷⁹ For Antonin Scalia and Maureen Scalia, the

⁷⁷ Antonin Scalia, *On Realism and the Religion Clauses of the First Amendment*, <https://www.americanrhetoric.com/speeches/antonin Scalia realism religion constitution.htm> (last visited March 29, 2019).

⁷⁸ BRUCE ALAN MURPHY, *supra* note 33.

⁷⁹ Ashley McGuire, *Justice Antonin Scalia on Family Life*, INSTITUTE FOR FAMILY STUDIES (Feb. 18, 2016), <https://ifstudies.org/blog/justice-antonin-scalia-on-family-life/>. On another occasion, Justice Scalia quipped, “We didn’t set out to have nine children. We’re just old-fashioned Catholics, playing what used to be known as ‘Vatican Roulette.’” JOAN BISKUPIC, *supra* note 11, at 187.

vocation of marriage was found in the husband's loving commitment to the wife and in the wife's loving commitment to the husband, and through that love does life and offspring arise, which lead to the further but derivative vocations of father and mother.

A vocation requires limits. A vocation sets boundaries. It is in vocation that mutually respectful boundaries are set. The priest respects the married state. The husband and wife respect their bond. The artist respects the value of the physician, and the physician of the accountant. And the judge of the legislator. For Antonin Scalia, the judge who tries to become a legislator does not respect his own vocation. As he told one audience tongue in cheek, "I don't deal with policy—that's not my business. I gave it up when I took the veil."⁸⁰

It was in defense of his vocation a judge that Antonin Scalia crossed swords with St. Thomas Aquinas, in front of an audience of Dominicans, no less.⁸¹ He reflected on Aquinas' views on the written law and the role of the judge. He was delighted to have read what seemed to Aquinas's affirmation of textualism: "Hence it is necessary to judge according to the written law, else judgment would fall short either of the natural or the positive right."⁸² But Scalia's happiness vanished in reading further:

Just as the written law does not give force to the natural right, so neither can it diminish or annul its force, because neither can man's will change nature . . . Wherefore such documents are not be called, not laws, but rather corruptions of law . . . and consequently judgment should not be delivered according to them.⁸³

"Horrors!" Scalia exclaimed. "A sentiment worthy of Chief

⁸⁰ Margaret Talbot, *Supreme Confidence: the Jurisprudence of Justice Antonin Scalia*, THE NEW YORKER (March 28, 2005), <https://www.newyorker.com/magazine/2005/03/28/supreme-confidence>.

⁸¹ Antonin Scalia, *Natural Law*, in SCALIA SPEAKS, *supra* note 9, at 243.

⁸² THOMAS AQUINAS, SUMMA THEOLOGIAE, Pt. II-II, Art. 60, Q.5. And even better phrase for Scalia was St. Thomas's quote of St. Augustine, "*In these earthly laws, though men judge about them when they are making them, when once they are established and passed, the judges may judge no longer of them, but according to them.*" *Id.* (emphasis in original).

⁸³ *Id.*

Justice Earl Warren!”⁸⁴ But there was more.

Even as unjust laws by their very nature are, either always or for the most part, contrary to the natural right, so too laws that are rightly established, fail in some cases, when if they were observed they would be contrary to the natural right. Wherefore in such cases, judgment should be delivered, not according to the letter of the law, but according to equity which the lawgiver has in view.⁸⁵

“Double horrors!” Scalia exclaimed again. “Judging not by text but by equity. A sentiment worthy of Justice William Brennan.”⁸⁶

To counter Aquinas, Scalia gave examples of the deleterious effects a non-textual decision can wreak, one being the creation of a constitutional right to same-sex marriage. At bottom, Scalia averred, Aquinas had his vocation, and he had his. “He knows infinitely more about theology; but I have much more experience in judging.”⁸⁷

What Scalia was trying to affirm was the self-discipline that is required of any vocation, be it mother, or artist, or truck driver, or teacher, or priest, or student, or theologian, or judge. Catholic spirituality calls it detachment, detachment from the temptation of things, even good things, which draw one away from one’s vocation.⁸⁸ It was that detachment—whether it be from public policy or the natural law—that Justice Scalia preached to his fellow justices. In sum, his message was: the politicians have their vocation. We have ours. Do not be what you were not called to be.

And preach it he did. He was often an irascible scold to his peers. That’s why his dissents are so enjoyable. That leads to a critique. One might say that Scalia’s weakest virtue was prudence,

⁸⁴ ANTONIN SCALIA, *supra* note 9, at 245.

⁸⁵ THOMAS AQUINAS, *SUMMA THEOLOGIAE* II-II, Art. 60, Q.5.

⁸⁶ ANTONIN SCALIA, *supra* note 9, at 245.

⁸⁷ *Id.*

⁸⁸ “Detachment from creatures that are an obstacle to complete service of God is a normal condition for growth in holiness.” *Detachment*, CATHOLIC DICTIONARY, <https://www.catholicculture.org/culture/library/dictionary/index.cfm?id=33051> (last visited March 29, 2019).

often called the “queen of the virtues,”⁸⁹ which St. Thomas defined as “right reason applied to action.”⁹⁰ Sometimes, Chief Justice William Rehnquist preached back. “Nino,” he wrote Scalia after yet another opinion criticizing Justice O’Connor’s reasoning, “you are pissing off Sandra again. Stop it.”⁹¹

For Antonin Scalia, the Court was his temple, and the Constitution his magisterium. As Christ, in righteous anger, rid his “father’s house,” of the money changers,⁹² so Scalia felt called to rid the temple of those opinions failing to honor the Constitution as it was. “My most important function on the Supreme Court is to tell the majority to take a walk.”⁹³ He spoke often of the oath of office he took to defend the Constitution of the United States. In debate, opinion, interview, or plain conversation, for Antonin Scalia, originalism was a moral command, an unshakable necessity to his vocation as judge. The sovereign people had created the Constitution, “the substance of what continues to bind us together as a people,”⁹⁴ and he was without authority to subvert their will.⁹⁵

But what of St. Thomas’s moral precept: no judge may render a decision contrary to the natural law? What if, despite the fallibility of one’s reason, despite one’s tendency to translate one subjective desires into moral imperatives, Justice Scalia was certain that a law was violative of the natural law? What if the two magisteria—the Constitution and the Church—were at odds? What should he do? In such a case, Scalia would bow to St. Thomas: he would not render a decision contrary to natural right. But only where “positive law places

⁸⁹ Don Fier, *The Cardinal Virtues—Prudence*, THE WANDERER PRESS (Sept. 15, 2018), <http://thewandererpress.com/catholic/news/our-catholic-faith/the-cardinal-virtues-prudence/>.

⁹⁰ AQUINAS, *supra* note 85, at II-II, Q47, art. 2.

⁹¹ RICHARD L. HASEN, THE JUSTICE OF CONTRADICTIONS: ANTONIN SCALIA AND THE POLITICS OF DISRUPTION 73 (2018).

⁹² JOHN 2:14-15.

⁹³ JOAN BISKUPIC, *supra* note 11, at 283.

⁹⁴ ANTONIN SCALIA, *supra* note 9, at 157.

⁹⁵ Article VI of the Constitution declares that “This Constitution . . . shall be the Supreme Law of Land.” One might emphasize that the words denote *this* Constitution, the 1787 one, not one which modern justices wished we would have.

a judge in the position of being the instrument of evil.”⁹⁶ Here, Justice Scalia was calling upon a moral distinction undoubtedly schooled into him by his Jesuit teachers: one is morally culpable of an evil only if one formally or materially participates in its commission.

One *formally* participates in an evil act if one actually does it with the requisite knowledge and intent: performing an abortion or executing a prisoner (if that is immoral), for example. One *materially* participates in an evil act if one knowingly provides the requisite means (which are normally not evil) for the act to be carried out by someone else.⁹⁷ This is where Scalia distinguished between the moral effect of his decisions on abortion and on capital punishment.

In regard to abortion, all Scalia would hold is that the Constitution allows the states the right to forbid, restrict, or permit abortion. It is a jurisdictional issue. If a state decides to permit abortion, that is the state’s moral failing (including its voters and the legislators), but not the judge who merely determines the jurisdictional question in accordance with the Constitution.⁹⁸ Nor would lower court Catholic judges materially participate in an abortion in striking down a restrictive law under *Roe v. Wade*. “They merely hold...that the government cannot prevent that killing.”⁹⁹ But capital punishment is different.

When I sit on a Court that reviews and affirms capital convictions, I am part of ‘the machinery of death.’ My vote, when joined with at least four others, is, in most cases, the last step that permits an execution to proceed. I could not take part in that process if I believed what was being done to be immoral.¹⁰⁰

The same would be true for lower court Catholic judges. There are not merely providing material co-operation, but “are themselves

⁹⁶ ANTONIN SCALIA SPEAKS, *supra* note 9, at 248.

⁹⁷ Gerry Rauch, *Formal vs. Material*, NATIONAL CATHOLIC REGISTER (Jan. 11, 1998), http://www.ncregister.com/site/article/formal_vs_material.

⁹⁸ The judge “[b]ears no moral guilt for the laws society has failed to enact.” Scalia, *supra* note 59.

⁹⁹ ANTONIN SCALIA, *supra* note 9, at 249.

¹⁰⁰ Scalia, *supra* note 59.

decreeing death on behalf of the state.”¹⁰¹ No morally acute Catholic could be a judge on a court that must decide whether a capital sentence is to be imposed or effectuated.¹⁰²

Moreover,

I do not think it would be a good thing if American Catholics running for legislative office had to oppose the death penalty (most of them would not be elected); if American Catholics running for Governor had to promise commutation of all death sentences (most of them would never reach the Governor’s mansion); if American Catholics were ineligible to go on the bench in all jurisdictions imposing the death penalty; or if American Catholics were subject to recusal when called for jury duty in capital cases.¹⁰³

This was the reason Scalia fought so vigorously against the new papal position on the death penalty. If a prohibition on capital punishment were truly part of the “deposit of faith,” he could no longer be a servant of the Constitution and of God and still be a judge.

On another issue, Scalia was acutely aware of the moral distinctions Catholic writers have made. Despite his sometimes haranguing dissents, Antonin Scalia did practice a deeper prudence. He often said, “I’m an originalist and a textualist, but I’m not a nut.”¹⁰⁴ At other times he called himself a “faint-hearted originalist.”¹⁰⁵ He meant that particularly in relation to the incorporation doctrine, the long standing view that the 14th Amendment’s due process clause somehow incorporates most of the Bill of Rights and applies them to

¹⁰¹ *Id.*

¹⁰² Scalia understood that there was an exception for one who was materially co-operating in an evil, namely “[t]hat one can give ‘material cooperation’ to the immoral act of another when the evil that would attend failure to cooperate is even greater (for example, helping a burglar tie up a householder where the alternative is that the burglar would kill the householder).” But that exception does not apply to the trial or appellate judge, who is actually participating in the execution itself. *Id.*

¹⁰³ *Id.*

¹⁰⁴ Nina Totenberg, *Justice Scalia, the Great Dissenter, Opens Up*, NPR (April 28, 2008), <https://www.npr.org/templates/story/story.php?storyId=89986017>.

¹⁰⁵ Originalism, *supra* note 2, at 863.

the States. Many have questioned whether incorporation was the original understanding of the drafters and ratifiers of the 14th Amendment. Scalia had his doubts. Now if the original understanding of the Constitution is a moral command, the central focus of one's vocation, how can one justify adhering to a series of precedents that one believes to be wrong? How Catholic is that? The answer is, very Catholic. The Church's moral philosophers have always counseled against creating scandal: scandal being defined as bringing into disorder a system that, despite its imperfections, is still fundamentally sound and upon which people depend. Here, Scalia chose to follow St. Thomas. Even though one has a right, as St. Thomas put it, to disobey unjust laws, one should "yield his right . . . in order to avoid scandal or disturbance."¹⁰⁶ Scalia believed—contrary to the views of another originalist, Clarence Thomas—that disrupting the precedents on incorporation would cause such a scandal, so he accepted them.

In sum, Antonin Scalia's notion of the role of a judge was informed by his Catholic understanding of vocation. But it was equally limited by his Catholic understanding of moral responsibility and of the dangers of scandal.

IV

During Antonin and Maureen Scalia's honeymoon year, they saw Robert Bolt's play, *A Man for All Seasons*, in London.¹⁰⁷ St. Thomas More, at least Bolt's depiction of him, became a model for Scalia, or a confirmation of Scalia's own understanding of how he should conduct his own life. More's distinction between the laws of God and the laws of man struck Scalia as just right. More resigned his chancellorship because he could not affirm Henry VIII's illegal divorce and displacement of the Pope as the head of the Church in England. But More was a reluctant martyr. He avoided sacrificing himself for a cause, until there was no other moral option. Through it all, More championed the positive law, "Man's laws, not God's." It was the rule of law that protects all, even the most evil of men (or

¹⁰⁶ AQUINAS, *supra* note 85, at I-II, Q. 96, art. 4.

¹⁰⁷ Scalia, *supra* note 51, at 107.

spirits). Scalia's law was the Constitution, a noble document, but one which allowed men, and states, to make some kinds of bad law. Like More, Scalia would remain the "King's (the Constitution's) good servant" until there was no other option. And as More would resist the importuning of his son-in-law Roper, so Antonin Scalia would resist the importunings of causes, advocates, and justices (and popes), who thought they had the key to the "law" the supervened the Constitution. When it came, without escape, to a choice between man's law and God's, then More would choose God's law, as would Antonin Scalia, if it ever came to that. But Antonin Scalia fought to make sure that it never did.